



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 19, 2013

Mr. S. Anthony Safi  
Attorney for the El Paso Independent School District  
Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C.  
P.O. Box 1977  
El Paso, Texas 79999

OR2013-22209

Dear Mr. Safi:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 509442 (EPISD ORR#2013.413).

The El Paso Independent School District (the "district"), which you represent, received a request for the requestor's personnel file, including all evaluations, disciplinary actions, and investigations. You state you have released some information to the requestor. We understand you have redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, and 552.135 of the Government Code and privileged under Texas Disciplinary Rule of Professional Conduct 1.05, Texas Rule of Civil Procedure 192.5, and

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<sup>1</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Texas Rule of Evidence 503.<sup>2</sup> We have considered your arguments and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, you inform us some of the information at issue was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-19875 (2013). In that ruling, we determined the district may (1) rely on Open Records Letter No. 2013-18904 (2013) as a previous determination and withhold the information previously ruled upon under section 552.108(a)(1) of the Government Code, and (2) withhold the remaining information under section 552.108(a)(1) of the Government Code. We understand the law, facts, and circumstances on which the previous ruling was based have not changed. Therefore, to the extent the information at issue is identical to the information ruled on in that ruling, we conclude the district may rely on Open Records Letter No. 2013-19875 as a previous determination and withhold the identical information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, because the remaining information at issue is not encompassed by the previous determination, we will consider your arguments against disclosure of this information.

Next, we note the submitted information is subject to section 552.022(a)(1) of the Government Code, which reads as follows:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

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<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with Texas Disciplinary Rule of Professional Conduct 1.05, Texas Rule of Civil Procedure 192.5, and Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2 (2002), 575 at 2 (1990).

<sup>3</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Gov't Code § 552.022(a)(1). The remaining information consists of a completed investigation by the district and must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. *See id.* Although you assert the remaining information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Therefore, the district may not withhold the remaining information under section 552.103, section 552.107, or section 552.111. Further, the Texas Disciplinary Rules of Professional Conduct are not considered “other law” for purposes of section 552.022. Consequently, we do not address your argument under rule 1.05 and the district may not withhold any of the remaining information on this basis. *See* ORD 676 at 3-4. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Additionally, information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, and sections 552.101 and 552.135 of the Government Code make information confidential under the Act. Accordingly, we will consider your arguments under sections 552.101, 552.108, and 552.135 of the Government Code, Texas Rule of Civil Procedure 192.5, and Texas Rule of Evidence 503.

Section 552.108(a)(1) of the Government Code excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime if release of the information would interfere with the detection, investigation, or prosecution of crime. Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. *See* Open Records Decision Nos. 474 at 4-5 (1987). Where a non-law-enforcement agency possesses information relating to a pending case of a law enforcement agency, the non-law-enforcement agency may withhold the information under section 552.108(a)(1) if it demonstrates the information relates to the pending case and this office is provided with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information.

You have submitted correspondence showing the United States Attorney's Office for the Western District of Texas objects to the release of the submitted information because it pertains to a pending criminal investigation that is being handled by that office and the

Federal Bureau of Investigation. Based upon this representation and our review, we determine release of the remaining information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, the district may withhold the remaining information under section 552.108(a)(1) of the Government Code.<sup>4</sup>

In summary, the district may rely on Open Records Letter No. 2013-19875 as a previous determination and withhold the information that was previously ruled upon in accordance with that ruling. The district may withhold the remaining information under section 552.108(a)(1) of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Thana Hussaini  
Assistant Attorney General  
Open Records Division

TH/som

Ref: ID# 509442

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.